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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2967-14T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ERIC G. MARTINEZ,
a/k/a ERICK MARTINEZ GONZALEZ,

Defendant-Appellant.

Argued September 20, 2016 – Decided April 27, 2017

Before Judges Fisher and Leone.

On appeal from Superior Court of New Jersey,
Law Division, Mercer County, Indictment No.
13-06-0732.

Joshua Altman argued the cause for appellant
(Benedict and Altman, attorneys; Mr. Altman,
on the brief).

Judah Babuschak Opacki, Special Deputy
Attorney General/Acting Assistant Prosecutor,
argued the cause for respondent (Angelo J.
Onofri, Acting Mercer County Prosecutor,
attorney; Laura Sunyak, Special Deputy
Attorney General/Acting Assistant Prosecutor,
of counsel and on the brief).

PER CURIAM

Defendant Eric G. Martinez appeals his January 21, 2015 judgment of conviction for aggravated assault, which left Armando Garduno blind in one eye, and weapons offenses. We affirm.

I.

The State's evidence against defendant included the following. On August 12, 2012, defendant was drinking beers with Mario Palma and co-defendant Victor Marcos at a restaurant owned by Marcos's parents. At another table, Garduno was celebrating his birthday with friends, including Isidro Lima, his stepson Jonathan Hernandez, and a person named Sergio. Garduno had at least twelve beers and became intoxicated.

At around 11:35 p.m., defendant and Marcos escorted Garduno out of the restaurant. They said he needed to leave and not return because he was too drunk and was "causing trouble." They and Garduno argued outside the restaurant, and Marcos challenged Garduno to fight.

When Garduno declined to fight, defendant taunted him and then attacked him. Defendant grabbed, pushed, and hit Garduno, knocking him to the ground. Garduno got up to fight, but Marcos and Hernandez separated defendant and Garduno.

Garduno walked away from the restaurant, and then joined Lima and Hernandez heading toward their apartment. On the way, Marcos and defendant approached Garduno. Marcos said he wanted to discuss

their differences, and Garduno remained with them while Lima and Hernandez continued walking. After about two minutes, Marcos grabbed Garduno by the neck and forced him to the ground.

Defendant took off his belt, wrapped the belt around his hand, placed the square metal buckle on his knuckles, and began punching Garduno. Defendant punched Garduno's left eye with the buckle three or four times. Defendant then whipped Garduno with the belt-buckle end of the belt. Garduno also said Marcos kicked him.

Hernandez and Sergio pulled defendant and Marcos off Garduno, whose face and clothes were bloody. Garduno's brother Juan Sebastian Garduno arrived, saw Garduno, went to confront Marcos at the restaurant, and saw defendant putting on a belt.

Lima called 9-1-1, and East Windsor Township Officer Michelle McCandrew arrived at the scene. She saw Garduno's left eye was swollen shut and he had several square-shaped injuries on his left side. She took Garduno to the emergency room, where the nurse saw multiple square-shaped bruises on his body. Due to Garduno's severe eye injury, he was transferred to Wills Eye Hospital in Philadelphia and treated by Dr. Carl Regillo and others. They were unable to save the vision in Garduno's left eye.

At trial, the State called Garduno, Garduno's brother, Lima, the nurse, Dr. Regillo, Officer McCandrew, and other officers.

Co-defendant Marcos testified on his own behalf as follows. When he tried to convince Garduno to leave the restaurant, Garduno became enraged and cursed at him and defendant. When Marcos tried to hold back defendant, Garduno jumped over him to hit defendant. Even after they were separated, Garduno continued to taunt defendant and Marcos. Defendant and Palma left the restaurant, and Marcos followed. Marcos found defendant in a fight with Hernandez. Marcos and Garduno became involved in the fight. Marcos did not hold Garduno down or see defendant hit anyone with a belt.

Defendant called Palma, who testified he never saw defendant hit Garduno with the belt wrapped around his fist, but he saw defendant swing his belt at Garduno after Garduno pulled a small pocketknife. However, the nurse testified she found no knife on Garduno, and Officer McCandrew testified her search of the area found no weapons.

The restaurant's external surveillance video showed the initial confrontation, including defendant hitting Garduno and knocking him to the ground and Garduno walking away at midnight. At 12:08 a.m., the video showed defendant reappearing shirtless holding a belt in his hand. At 12:18 a.m., the video showed defendant returning with his shirt on and the belt in his hand, just before Garduno's brother arrived at the restaurant.

The grand jury charged defendant and Marcos with second-degree aggravated assault causing or attempting to cause serious bodily injury, N.J.S.A. 2C:12-1(b)(1); third-degree possession of a weapon for unlawful purposes, N.J.S.A. 2C:39-4(d); and fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d). After a ten-day trial, the jury convicted defendant of all charges and acquitted Marcos. The trial court denied defendant's motion for a new trial and sentenced defendant to six years in prison with 85% to be served without parole under N.J.S.A. 2C:43-7.2.

Defendant appeals, arguing:

I. THE SUMMATION OF THE PROSECUTOR IMPERMISSIBLY SHIFTED THE BURDEN OF PROOF TO THE DEFENDANT AND[] IMPINGED ON THE RIGHT TO REMAIN SILENT DENYING DEFENDANT OF FUNDAMENTAL CONSTITUTIONAL PROTECTIONS.

II. THE CONVICTIONS OF DEFENDANT SHOULD BE VACATED BECAUSE THE STATE'S SUMMATION IMPERMISSIBLY AND WITHOUT THE NECESSARY APPLICATION INTRODUCED OTHER-CRIMES EVIDENCE, IN VIOLATION OF N.J.R.E. 404(B).

III. THE ADMISSION OF A PROHIBITED HEARSAY STATEMENT FROM JUAN SEBASTIAN GARDUNO PREJUDICED THE DEFENDANT AND THE ADMISSION OF THE STATEMENT WITH NO CURATIVE INSTRUCTION WARRANTS THE GRANTING OF A NEW TRIAL.

IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND DENIED DEFENDANT THE RIGHT TO CONFRONTATION BY LIMITING THE SCOPE OF CROSS-EXAMINATION AND REFUSING TO COND[UC]T A 104 EVIDENTIARY HEARING REGARDING THE ABILITY TO IMPEACH[] A WITNESS WITH PENDING CHARGES AND IMMIGRATION STATUS.

II.

Defendant challenges comments in the prosecutor's summation. "Prosecutors are afforded considerable leeway in closing arguments as long as their comments are reasonably related to the scope of the evidence presented." State v. R.B., 183 N.J. 308, 332 (2005) (citation omitted). "[T]o justify reversal, the prosecutor's conduct must have been "clearly and unmistakably improper"" and "'so egregious as to deprive defendant of a fair trial.'" State v. Wakefield, 190 N.J. 397, 437-38 (2007) (citations omitted), cert. denied, 552 U.S. 1146, 128 S. Ct. 1074, 169 L. Ed. 2d 817 (2008).

A.

First, defendant cites the prosecutor's comments that the defense could not explain the square, belt-buckle-shaped injuries on the left side of Garduno's face. The State argues the prosecutor was responding to the defense summations. "[A]n appellate court will consider whether the offending remarks were prompted by comments in the summation of defense counsel." State v. Smith, 212 N.J. 365, 403-04 (2012), cert. denied, __ U.S. __, 133 S. Ct. 1504, 185 L. Ed. 2d 558 (2013). "A prosecutor may respond to defense claims, even if the response tends to undermine the defense case," State v. Nelson, 173 N.J. 417, 473 (2002), "'so long as it does not constitute a foray beyond the evidence adduced

at trial,'" State v. Patterson, 435 N.J. Super. 498, 510-11 (App. Div. 2014) (citation omitted). Further, "[a] prosecutor's otherwise prejudicial arguments may be deemed harmless if made in response to defense arguments." State v. McGuire, 419 N.J. Super. 88, 145 (App. Div.), certif. denied, 208 N.J. 335 (2011).

In summation, defendant's counsel questioned "how do you wrap a belt around your knuckles so that the belt buckle is on the outside where you could hit somebody with such force that you could do that kind of damage?" Counsel also argued defendant was left-handed and questioned if "you're a lefty, how do you cause all that damage to the left side of the person's face?" Counsel concluded: "It doesn't make any logical sense because it didn't happen because the belt was never wrapped around my client's hand because the belt was used in self-defense[.]" Defendant's counsel theorized that the intoxicated Garduno instigated a fight involving six or seven persons, that Garduno wielded a pocketknife in his right hand, and that in self-defense defendant whipped his belt at the knife, hitting Garduno on the right side and back.

Responding in his summation, the prosecutor referenced Dr. Regillo's testimony that Garduno's eyeball was severely ruptured by a sharp linear cut of the cornea and lid. The prosecutor noted that defendant's counsel asked if the injury could be caused by a fall, and Dr. Regillo answered that a blunt force could not cause

such an injury. The prosecutor argued: "The defense cannot explain how that injury happened."

The prosecutor noted defendant's counsel "spent a lot of time attacking the State's witnesses," especially Garduno. The prosecutor argued: "Why is that, that they're doing that? Because they can't explain . . . why he's doing that, because he can't explain away the physical evidence in this case," particularly the "unique, sharp injury" to Garduno's eye. Later, the prosecutor reiterated "the defense can't explain the injury to [Garduno]'s eye." The prosecutor noted that the evidence pointed to a sharp object causing the injury and that the only evidence of a sharp object was the belt buckle. The prosecutor closed by asking the jury to consider all the testimony and "the video and pictures of [Garduno]'s injuries, . . . including the imprint of the belt buckle, the type of wounds to his eyes, the fact that the defense can't explain those and that his client has the object that would have caused those."

After the summation, defendant's counsel objected and moved for a mistrial, arguing the prosecutor shifted the burden to defendant because he said "the defense couldn't put on evidence to explain" how the injury occurred. The prosecutor pointed out he did not argue defendant had to put on evidence. The trial court cited counsel's argument that, "because [defendant] is left-

handed, [he] could not inflict the injury to the victim's left eye." The court found "in the unique circumstances of this case based on the closing remarks you made, [the prosecutor's summation] was appropriate fair comment."

Defendant argues this case is like State v. Black, 380 N.J. Super. 581 (App. Div. 2005), certif. denied, 186 N.J. 244 (2006). Black was accused of killing his infant daughter when she was in his sole care. In summation, "the prosecutor stated, '[t]he only person in this courtroom who could tell us exactly how little Ziaya was murdered is this man sitting right here [indicating the defendant].'" Id. at 592 (alteration in original). The prosecutor added: "'The defendant never provides any insight into what happened.'" Ibid. We ruled the prosecutor's "comment compromised defendant's right to remain silent. It also had the capacity to transfer the burden of proof from the State to defendant." Id. at 593. We ruled the prosecutor's comment "coupled with an inflammatory conclusion to [his] summation" required reversal. Id. at 595.

Here, by contrast, the prosecutor did not point to defendant and fault him for remaining silent. Nor did the prosecutor say defendant had to present evidence. Moreover, the prosecutor's closing was not inflammatory.

This case bears a closer resemblance to State v. Purnell, 126 N.J. 518 (1992). There, "the prosecutor referred to defendant's failure to explain how his sweatshirt was found at Marie Simmons's house." Id. at 539. Our Supreme Court found no error because "[t]he comment on the sweatshirt was not a direct comment on defendant's failure to testify, but was at least partially in response to defense counsel's assertion during summation that Simmons had lied when she testified that defendant had come to her house Friday night." Id. at 539-40.

The State concedes the prosecutor's argument could have been better phrased. In State v. Gosser, 50 N.J. 438 (1967), cert. denied, 390 U.S. 1035, 88 S. Ct. 1434, 20 L. Ed. 2d 295 (1968), a prosecutor argued "'[t]here was no explanation'" why a gun case and shells were out in the open. Id. at 452. Our Supreme Court noted, while "he used the phrase 'no explanation,'" "[i]t had the same connotation as if he had [used another phrasing] which would have been quite unobjectionable." Id. at 453. The Court found no reversible error, saying "[t]his kind of a question should not turn on mere semantics." Ibid.

In light of Purnell and Gosser, it was not reversible error for the prosecutor to comment that defense counsel's theory about how the fight occurred did not explain the square-shaped wounds on Garduno's face and eye. See State v. Zola, 112 N.J. 384, 427

(1988) (finding a prosecutor's "comments were intended to address not so much the failure of the defendant to testify as the incompleteness of the experts' analyses of all the evidence in the trial"), cert. denied, 489 U.S. 1022, 109 S. Ct. 1146, 103 L. Ed. 2d 205 (1989).

In any event, the ultimate "issue is not the prosecutor's license to make otherwise improper arguments, but whether the prosecutor's 'invited response,' taken in context, unfairly prejudiced the defendant." United States v. Young, 470 U.S. 1, 12, 105 S. Ct. 1038, 1045, 84 L. Ed. 2d 1, 10-11 (1985); accord State v. Engel, 249 N.J. Super. 336, 379 (App. Div.), certif. denied, 130 N.J. 393 (1991). "[N]ot all summation comment on a defendant's failure to produce a witness would produce the impermissible effect of lessening the State's burden of proof." State v. Hill, 199 N.J. 545, 569 n.9 (2009). "Even a direct comment on a defendant's failure to testify may be cured by a judge's timely and effective action." State v. Scherzer, 301 N.J. Super. 363, 439-41 (App. Div.), certif. denied, 151 N.J. 466 (1997).

Here, when defendant objected, the trial court offered to emphasize the burden never shifts to defendant, and defendant's counsel said: "That's fine, Judge." Immediately after summations, the court instructed the jury on the presumption of defendant's

innocence and the State's burden of proof beyond a reasonable doubt, as set forth in the Model Jury Charge (Criminal), "Criminal Final Charge Parts 1 and 2 (General Information to Credibility of Witnesses)" at 2 (May 2, 2014) (hereinafter Criminal Final Charge).

In particular, the trial court instructed the jury "[t]he burden of proving each element of a charge beyond a reasonable doubt rests upon the State and that burden never shifts to the defendant. A defendant in a criminal case has no obligation or duty to prove his innocence or offer any proof relating to his innocence."¹ For emphasis, the court repeated that last sentence. Defendant's counsel said he had no objection to the instructions.

The trial court also frequently reiterated the burden of proof on the State throughout its instructions. For example, the court instructed the jury that for aggravated assault, "the State must prove beyond a reasonable doubt . . . that the defendants caused serious bodily injury to another"; for the lesser offense of simple assault, the State must prove beyond a reasonable doubt

¹ This instruction reiterated a near-identical instruction the court had given the jury when trial began:

The burden of proving each element of the charges beyond a reasonable doubt rests upon the State and that burden never shifts to either defendant. It is not the obligation or duty of a defendant in a criminal case to prove his innocence or offer any proof relating to his innocence.

that "the defendant, Eric [Martinez], caused bodily injury to Armando [Garduno]"; and for possession of a weapon with an unlawful purpose, "the State has the burden of proving beyond a reasonable doubt" that "a belt with a buckle" was "capable of being used to inflict serious bodily injury" and that defendant possessed it with the purpose of "inflict[ing] serious bodily injury on Armando."²

These instructions were "sufficient to remove any implication 'that the defense had some burden of proof.'" Patterson, supra, 435 N.J. Super. at 505, 513 (citation omitted) (finding a prosecutor's comment that the defense "'could have produced some testimony'" was not reversible error because of the court's prompt curative instruction); see State v. Jenkins, 349 N.J. Super. 464, 479 (App. Div.) (rejecting the defendant's claim "that the prosecutor improperly commented on defendant's failure to testify and implied that the defense had some burden of proof" given the court's "clear and explicit instructions to the jury after the summations"), certif. denied, 174 N.J. 43 (2002); Scherzer, supra, 301 N.J. Super. at 439-41 (finding any possible error from the prosecutor's remarks that defense counsel had not explained what

² The court also instructed the jury "[t]he State has the burden to prove to you beyond a reasonable doubt that the defense of self-defense" and the defense of intoxication did not apply.

happened to the weapon was remedied by "a curative instruction to the jury shortly after the prosecutor's remarks").

"We presume the jury followed the court's instructions." Smith, supra, 212 N.J. at 409. Defendant nonetheless argues the prosecutor's remarks caused the jury to acquit Marcos and convict him. That argument ignores the strong evidence that defendant was the assailant, including the surveillance video showing him wielding a belt which could cause the square-shaped injuries, and the weaker evidence against Marcos, as well as Marcos's testimony he was not involved in the attack which injured Garduno's eye.

We must hew to our standard of review. "Whether testimony or a comment by counsel is prejudicial and whether a prejudicial remark can be neutralized through a curative instruction or undermines the fairness of a trial are matters 'peculiarly within the competence of the trial judge.'" State v. Yough, 208 N.J. 385, 397 (2011) (citation omitted). Accordingly, "'[a]n appellate court will not disturb a trial court's ruling on a motion for a mistrial, absent an abuse of discretion that results in a manifest injustice.'" State v. Jackson, 211 N.J. 394, 407 (2012) (citation omitted). We find no abuse of discretion.

B.

Second, defendant challenges the prosecutor's remark concerning the testimony of defendant's witness Palma that Garduno

pulled a pocketknife. On cross-examination, Palma admitted he knew shortly after the incident that Garduno had been injured and defendant had been arrested, but for a year and a half he did not tell anyone Garduno had a knife even though it was "important information." Palma also conceded that during that period he talked to defendant "a few times" both "about the case" and about him coming to court. Moreover, Palma admitted he and defendant were "pretty good friends" and he did not want "anything bad to happen to [defendant]."

In his summation, the prosecutor noted that Palma was the only witness to claim Garduno had a pocketknife, that Palma did not tell anyone about the knife until eighteen months after the incident, and that Palma was defendant's friend. The prosecutor then argued: "the State submits right now that Eric Martinez and Mario Palma made up the knife. They talked about the case, you heard that from Mr. Palma, and defendant Eric Martinez realized how strong the case against him was. You saw the evidence."

Defendant did not object to the prosecutor's argument.³ Accordingly, "defendant must demonstrate plain error to prevail."

³ Defendant argues his motion for a mistrial "implicitly[] captured" this comment. However, defendant's counsel challenged only the prosecutor's remarks about the defense failure to explain the square-shaped wounds. Counsel made no mention of the comment about Palma and said "No" when the trial court asked if he had any other points to make about the prosecutor's summation.

State v. Timmendequas, 161 N.J. 515, 576 (1999), cert. denied, 534 U.S. 858, 122 S. Ct. 136, 151 L. Ed. 2d 89 (2001). "Plain error is 'error possessing a clear capacity to bring about an unjust result and which substantially prejudiced the defendant's fundamental right to have the jury fairly evaluate the merits of his defense.'" Id. at 576-77 (citation omitted). "Generally, if no objection was made to the improper remarks, the remarks will not be deemed prejudicial." Id. at 576. Indeed, it was "fair to infer from the failure to object below that in the context of the trial the error was actually of no moment." Nelson, supra, 173 N.J. at 471 (quoting State v. Macon, 57 N.J. 325, 333 (1971)).

Defendant argues the prosecutor's remark had to meet the requirements of N.J.R.E. 404(b) because it suggested defendant engaged in witness tampering, which is a crime. Under defendant's argument, a prosecutor could not argue a defendant's testimony was knowingly false, which is also a crime, without first meeting the multiple requirements for Rule 404(b) evidence imposed by State v. Cofield, 127 N.J. 328, 338 (1992). No case has ever so held. "Under [the plain error] standard, defendant has the burden of proving that the error was clear and obvious[.]" State v. Morton, 155 N.J. 383, 421 (1998); accord State v. Chew, 150 N.J. 30, 82 (1997) (following United States v. Olano, 507 U.S. 725, 734, 113 S. Ct. 1770, 1777, 123 L. Ed. 2d 508, 519 (1993)). An error is

"'plain'" only if "the error is clear under current law." Olano, supra, 507 U.S. at 734, 113 S. Ct. at 1777, 123 L. Ed. 2d at 519. Defendant cannot make that showing here.

In any event, arguments in summation are not subject to the New Jersey Rules of Evidence. Nor did the prosecutor suggest he was offering evidence rather than argument. Rather, the prosecutor made clear he was making an argument by using the phrase "I submit," which is a proper "'method of prefacing an argument.'" State v. Cagno, 409 N.J. Super. 552, 604 (App. Div. 2009) (citation omitted), aff'd, 211 N.J. 488 (2012), cert. denied, __ U.S. __, 133 S. Ct. 877, 184 L. Ed. 2d 687 (2013). Moreover, the trial court repeatedly instructed the jury that "summations of counsel are not evidence and must not be treated as evidence."

Thus, the issue is whether the prosecutor's argument was "'based on the evidence in the case and the reasonable inferences from that evidence.'" State v. T.J.M., 220 N.J. 220, 236 (2015) (citation omitted). It is not "reversible error for the prosecutor to call [a] defendant's testimony a 'self-serving pack of lies'" if "the prosecutor's comment was based on reasonable inferences drawn from the evidence presented during the trial." Morton, supra, 155 N.J. at 457-58. Similarly, "[a] prosecutor may . . . suggest that [a defendant and defense] witnesses lied." State v. Abdullah, 372 N.J. Super. 252, 268 (App. Div. 2004), aff'd in

part, rev'd in part on other grounds, 184 N.J. 497 (2005). "This is especially so where there is conflicting evidence or reasonable inferences can be drawn from the evidence presented during the trial." Ibid.

Here, the evidence could support reasonable inferences that Palma's testimony about a knife was false, that Palma was lying to help his friend, and that Palma and defendant discussed his testimony. It was not an unreasonable leap to infer defendant and Palma "made up the knife." Thus, that comment provides "'no ground for reversal.'" T.J.M., supra, 220 N.J. at 236 (citation omitted).

Further, "[e]ven where a prosecutor has been guilty of misconduct[to which a defendant objected] reversal of a defendant's conviction is not necessary unless the conduct was so egregious that it deprived the accused of a fair trial." Abdullah, supra, 372 N.J. Super. at 268. The prosecutor's argument that defendant and Palma "made up the knife" was less damning than an express accusation that defendant committed the crime of witness tampering. See State v. Burden, 393 N.J. Super. 159, 172 (App. Div. 2007), certif. denied, 196 N.J. 344 (2008).

"Where, as here, the defendant's lawyer fails to object at trial, we may legitimately infer that counsel did not consider the remarks inappropriate or prejudicial." Abdullah, supra, 372 N.J. Super. at 267-68. Defendant has not shown "the remarks, if

improper, substantially prejudiced the defendant[']s fundamental right to have the jury fairly evaluate the merits of [his] defense, [or] had a clear capacity to bring about an unjust result." Id. at 268 (first and second alterations in original) (quoting State v. Johnson, 31 N.J. 489, 510 (1960)).

III.

Defendant next notes Garduno's brother testified that when he went to the restaurant, Marcos "told me he didn't - I didn't do anything to him." Defendant did not object to the admission of his co-defendant's exculpatory statement, which contradicted the State's theory that Marcos was defendant's accomplice in an attack on Garduno. On appeal, however, defendant claims Marcos's statement was inadmissible hearsay. "Because no objection was advanced with respect to that hearsay evidence at trial, it must be judged under the plain-error standard: that is, whether its admission 'is of such a nature as to have been clearly capable of producing an unjust result.'" State v. Frisby, 174 N.J. 583, 591 (2002) (quoting R. 2:10-2).

Defendant cannot show plain error. He now asserts Marcos's statement "implicitly implicated" him. On the contrary, Marcos's statement did not explicitly or implicitly accuse defendant of anything. Defendant next claims that because the statement was exculpatory as to Marcos, it told the jury defendant must have

been the assailant. However, it was defendant's theory that Garduno was injured in a fight involving six or seven persons, so exculpating Marcos did not implicate defendant.

Moreover, Marcos took the stand and similarly testified he did not harm Garduno. Thus, defendant had the opportunity to cross-examine Marcos. Moreover, defendant's cross-examination of Marcos and his closing belies his suggestion on appeal that he was adversarial toward Marcos. In any event, defendant cannot show the admission of Marcos's exculpatory statement was "clearly capable of producing an unjust result." R. 2:10-2.

IV.

Finally, defendant argues his cross-examination of Garduno was unduly restricted. In fact, defendant's counsel cross-examined Garduno at length and was able to elicit the following impeachment information which he used in his closing arguments:

- After consuming twelve beers, Garduno was drunk during the incident and could not remember some aspects. Citing those facts and Garduno's blood alcohol level of .17% two hours after the incident, defendant's counsel argued Garduno "was so drunk" "he has no idea what went on" in his "alcohol haze."

- There were inconsistencies between Garduno's initial statement to police, his criminal complaint, and his testimony. Defendant's counsel also argued that his direct testimony was

inconsistent with his testimony on cross-examination and redirect and that he "doesn't remember much" and was offering "so many stories, so many versions."

- Ten weeks after the incident, Garduno consulted a lawyer about filing a lawsuit for money, then filed a criminal complaint against Marcos, and then filed a civil lawsuit for money against defendants. Defendant's counsel argued Garduno had a financial self-interest. Marcos's counsel argued Garduno had a monetary interest in getting defendants convicted and was "looking for a payday."

- Garduno faced open charges for drunk driving. Defendant's counsel also was allowed to ask about Garduno's open charge for hindering apprehension from the same 2011 incident.

- During this trial, Garduno was charged with sexual assault, which could result in five to ten years in jail.

- After those charges, and after meeting with the prosecutor, Garduno testified as a State witness. Defendant's counsel argued Garduno was testifying out of self-preservation because of his open charges. Marcos's counsel argued Garduno's open charges gave him even more reason to help the State convict defendants.

In his closing, defendant's counsel also argued that Garduno had "a convenient memory" recalling only favorable facts and that his testimony was inconsistent with Lima's testimony. Counsel

told the jurors Garduno's "testimony is not something you can rely on by any stretch of the imagination."

Nevertheless, defendant contends he was denied his rights to cross-examination and confrontation because the trial court ruled certain topics should not be raised on cross-examination. "The right to confront and cross-examine accusing witnesses is 'among the minimum essentials of a fair trial,'" but "is not absolute, and may, in appropriate circumstances, bow to competing interests." State v. Budis, 125 N.J. 519, 531 (1991) (quoting Chambers v. Mississippi, 410 U.S. 284, 294-95, 93 S. Ct. 1038, 1045, 1046, 35 L. Ed. 2d 297, 308, 309 (1973)). "Thus, trial courts 'retain wide latitude . . . to impose reasonable limits on . . . cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" Id. at 532 (quoting Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 1435, 89 L. Ed. 2d 674, 683 (1986)); see State v. Bass, 224 N.J. 285, 303 (2016). "The scope of cross-examination . . . rests within the sound discretion of the trial court." State v. Harvey, 151 N.J. 117, 188 (1997).

First, defendant challenges the trial court's ruling he could not elicit that the sexual assault was a "second-degree" crime,

which could result in Megan's Law registration and parole supervision for life. The court found Garduno and the jurors would be confused about the meaning of "second-degree" and Megan's Law and barred reference to them under N.J.R.E. 403. Instead, the court allowed defendant to convey the seriousness of the sexual assault by eliciting the more concrete fact that Garduno faced five to ten years in prison. Indeed, Garduno admitted the sexual assault charge was "a big problem."

Second, defendant claims he was not allowed to elicit that the hindering charge alleged Garduno provided a false license. The trial court initially ruled defendant could ask about that, but it later became concerned such a question would ask the unrepresented Garduno to incriminate himself. Defendant's counsel responded that "I don't want him to incriminate himself on that" and that as Garduno was facing more serious charges, the disorderly-persons "hindering charge from two years ago seems like small time." Instead, the court allowed and defendant conducted cross-examination by asking solely if Garduno had been charged with hindering.

Third, defendant complains the trial court did not allow him to elicit that Garduno entered the United States illegally. Indeed, the court similarly precluded mention of the fact that other witnesses, and defendant, were in the United States

illegally. An alien's "illegal status in this country is very likely to trigger negative sentiments in the minds of some jurors." Serrano v. Underground Utils. Corp., 407 N.J. Super. 253, 274 (App. Div. 2009).

Given the many other avenues defendant utilized for attacking Garduno's credibility, these additional topics were not "relevant and necessary to resolve [that] issue, taking into account the other evidence that [wa]s available to address that issue." State v. J.A.C., 210 N.J. 281, 299 (2012). Defendant was permitted to cross-examine Garduno on all of his open charges, and the jury was instructed it could consider whether there was "any bias and motivation for [Garduno] to testify on behalf of the State because of any possible favorable treatment he hopes to receive from the State" on the open charges. Moreover, defendant cross-examined Garduno regarding his "possible bias . . . in favor of the side for whom the witness testified." Defendant also impeached his credibility through questions and argument alleging he had an "interest in the outcome of the trial"; had little or no "power of discernment" and "means of obtaining knowledge of the facts" due to his intoxication; had limited ability to "recollect and relate" those facts; made "inconsistent or contradictory statement[s]"; was "contradicted . . . by other evidence"; and "testified with an intent to deceive." Criminal Final Charge,

supra, at 5-6. Finally, the trial court could exclude the topics to the extent their probative value was "substantially outweighed by the risk of . . . undue prejudice, confusion of issues, or misleading the jury." N.J.R.E. 403.

Appellate courts "review the trial court's evidentiary ruling under a deferential standard; it should be upheld "absent a showing of an abuse of discretion, i.e., there has been a clear error of judgment.'" J.A.C., supra, 210 N.J. at 295 (citation omitted). The trial court's exclusion of these topics from cross-examination was not "an abuse of its sound discretion." State v. Leonard, 410 N.J. Super. 182, 189 (App. Div. 2009), certif. denied, 201 N.J. 157 (2010).

On appeal, defendant claims for the first time he should have been able to cross-examine Garduno about his mid-trial request asking for the trial court's help because his eye medication was at his home, he was jailed on the sexual assault charge, and he was in a lot of pain. However, because defendant never tried to cross-examine Garduno about that request, and never gave the trial court an opportunity to exercise its discretion, we decline to entertain his claim on appeal. See State v. Robinson, 200 N.J. 1, 20 (2009).


Finally, defendant argues the trial court should have held a hearing under N.J.R.E. 104. The court initially believed a Rule

104 hearing was necessary to explore whether Garduno believed he would receive favorable treatment from the prosecutor's office on his open charges. However, defendant's counsel argued that was "not a decision that the Court can make in a 104 hearing to take that credibility call away from the jury." After researching the issue, the court agreed a Rule 104 hearing was not necessary because "[t]he fact that the witness denies holding any expectation of leniency is not a proper basis for barring or curtailing cross-examination on the subject" of open charges. State v. Landano, 271 N.J. Super. 1, 40-41 (App. Div.), certif. denied, 137 N.J. 164 (1994). Counsel reiterated a Rule 104 hearing was not needed.

On appeal, defendant argues the trial court should have held a Rule 104 hearing to examine Garduno. However, "a "disappointed litigant" cannot argue on appeal that a prior ruling was erroneous "when that party urged the lower court to adopt the proposition now alleged to be error."" State v. A.R., 213 N.J. 542, 561 (2013) (citation omitted). Defendant has not shown the court's decision regarding the Rule 104 hearing caused a fundamental miscarriage of justice. See id. at 562. In any event, it was unnecessary to hold a Rule 104 hearing given the trial court's bases for its challenged rulings.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION